

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION**

In the Matter of

MALDEN MILLS INDUSTRIES, INC.

Employer

and

AREA TRADES COUNCIL, IUOE 877,
NERCC LOCAL 51, PLUMBERS LOCAL
12, IBEW LOCAL 103, PAINTERS
DISTRICT COUNCIL #35

Petitioner

Case 1-RC-21675

DECISION AND DIRECTION OF ELECTION¹

The Employer is a Massachusetts corporation engaged in the manufacture of textile products at two plants located in Lawrence, Massachusetts. The Petitioner seeks to represent a unit of maintenance and knit technicians employed at the Employer's two plants ("the Unit"). The parties stipulate that the following job classifications are in the Unit: commercialization knit technicians, lead pipefitters, lead mechanical group leaders,

¹ Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

The Employer asserts that the ballot should only contain the name of the Area Trades Council and objects to listing the individual constituent locals on any ballot that would result from this matter. The hearing officer overruled the Employer's objection; I affirm the hearing officer's ruling. Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

breakdown leadpersons, senior instrument technicians, lead senior instrument technicians/dye house, and general stockroom clerk. It is undisputed that the following classifications are excluded from the unit: the working supervisor breakdowns, the planner/maintenance, the stockroom supervisor, the boilerroom stationary engineers, the manager finishing/inspection, and the supervisor maintenance/dye house.

At issue are eight lead knit technicians who the Employer claims are supervisors and should be excluded from the Unit and the Petitioner contends are non-supervisory employees who should be included in the Unit. I find that the lead knit technicians are supervisors within the meaning of Section 2(11), and I shall exclude all eight employees from the Unit.

Background

The Employer, a Massachusetts corporation, is a textile manufacturer, producing high-tech Polar Fleece®, among other textile products. The Employer operates out of two plants located in Lawrence, Massachusetts. The two plants, the Lawrence Knitting Mill ("LKM") and the Mariner Knitting Mill ("MKM"), are located adjacent to one another. A Knitting Technical Director ("the Director"), located primarily in the MKM, oversees the lead technicians in both buildings, as well as operations of the production unit.² The Technical Manager ("the Manager"), located in the LKM, assists the Director.

The knit technicians are classified as lead technicians, technicians I, and technicians II. The technicians work on various machines of different complexity. In the MKM, there are the Pallum, Double Knit, FLD, VX FLD, DF3, and 3F knitting machines. The Vanguard, FL4, and Camber knitting machines are located in the LKM building. The production workers operate the machines and the knit technicians monitor the quality of the product, make adjustment to machines, repair the machines, and otherwise take care of the technical aspects of the machines.

The knit technicians I are entry level employees. They have the lowest technical skills; they perform the more basic jobs, including changing needles and working on barres. Most Knit Technicians I come from the production unit. Knit technicians II are either hired off the street or came from Bridgton, a mill which had been operated by the Employer but has since closed. Knit technicians II have more technical skill and greater experience in the maintenance of the machines.

The Employer runs a four-shift operation.³ There are two lead knit technicians assigned to each shift, one in the LKM and the other in the MKM building. In each

² The production employees have been and are currently represented by Local 311 of the Union of Needle Trades Industrial & Textile Employees (UNITE). There is a collective-bargaining agreement currently in effect from December 1, 2001 through November 30, 2004.

³ The A shift runs Monday, Tuesday, and Wednesday from 7 a.m. to 7 p.m.; the B shift Monday, Tuesday, and Wednesday from 7 p.m. to 7 a.m.; the C shift Thursday, Friday, and Saturday, from

building, approximately four knit technicians report to a lead knit technician for each shift. The technicians are paid according to their skill level. Knit technicians I are paid on average \$15 per hour; knit technicians II are paid on average \$17 per hour; and lead knit technicians are paid on average \$20 per hour. Knit technicians I and II are paid weekly, whereas lead knit technicians are paid bi-weekly.⁴ Knit technicians I and II are paid a lump sum vacation amount about July of every year when the plant shuts down. Lead knit technicians accrue their vacation throughout the year. Knit technicians I and II earn 40 hours a year in sick pay, while the lead knit technicians earn 80 hours a year.

Lead knit technicians spend approximately 30 percent of their time working with tools and performing knit technician work. The remainder of their time is spent assigning work to technicians and ensuring that the production operation runs smoothly. Lead knit technicians receive overtime compensation when overtime is available. However, unlike the other knit technicians, who receive overtime for hours worked in excess of a 36-hour workweek, lead knit technicians receive overtime compensation for hours worked in excess of a 40-hour workweek. Lead technicians do not wear uniforms. They use a different punch card than the technicians.⁵ Unlike knit technicians I and II, who receive their accrued vacation pay as a lump sum in July of each year, lead knit technicians can use their accrued vacation time throughout the year and get paid when they use it.⁶

Lead knit technicians have an office and use a computer to assist them in performing their duties. The knit technicians do not have access to the office and the computer. Lead knit technicians are appraised on their performance of their teams, as well as their own performance.

I. Authority to assign, or responsibly to direct employees

The Director relies on the lead knit technicians to ensure that production flows efficiently. On all night shifts, as well as on the weekends, the Director and the Manager are not present at the Mill buildings.⁷ Accordingly, lead knit technicians are responsible for the operation of the buildings and direct their teams of technicians. They are responsible for knowing the priorities of the company by customer order, quality, and production. If a priority changes during the day, the lead knit technicians reassign

7 a.m. to 7 p.m.; and the D shift Thursday, Friday, and Saturday from 7 p.m. to 7 a.m. Occasionally, the employees work Sundays.

⁴ The record shows that the lead pipefitter, lead mechanic, and group leader electric, positions that the parties stipulated are included in this unit, are paid bi-weekly as well.

⁵ The punch card they use is reserved for employees who get paid bi-weekly.

⁶ For example, lead technician Steven Hallett testified that if he uses a week vacation, he gets paid for that week when he uses it.

⁷ Generally, the Knitting Technical Director works from 5-6 a.m. until 4 p.m.; the Technical Manager works from 6:30 a.m. to 4:30 p.m.

technicians based on employees' skill level. In addition, when necessary, the lead knit technicians recommend training for technicians on their team.

The lead knit technicians determine whether or not overtime is necessary. They also select the employees who will work overtime. Overtime is usually assigned on a rotating system based on seniority. There are times, however, when the work that needs to be done must be assigned to a technician with the appropriate level of expertise. In those situations, the lead knit technician can deviate from the rotation system and assign the work to a technician with an appropriate level of expertise. Thus, the selection of employees for overtime can depend on matching the complexity of the machine that is being worked on during overtime with the particular skills of individual knit technicians.

II. Hiring, firing, laying off, recalling, promoting, and adjusting grievances

The Employer has not hired anyone in recent years because of its financial situation.⁸ In the past, the Director had conducted the interviews and made the decisions regarding hiring. Lead knit technicians can recommend that technicians be fired, laid off, or recalled, but they do not have the authority to do so themselves.⁹ Before a significant personnel action is taken against an employee, the Director conducts an investigation to make sure that the personnel action is supported by facts warranting such action. Nonetheless, the record evidence is that the Director follows the lead knit technicians' recommendations.

The undisputed record evidence is that lead knit technicians have the authority to approve an employee's request to leave early. In addition, unrebutted testimony asserts that lead knit technicians have authority to recommend promotions or pay increases and their recommendations are followed. Because of the Employer's difficult financial circumstances, however, employees have not received a pay increase since 2001. In explaining his deference to the recommendations of lead knit technicians, the Director testified that the lead knit technicians work very closely with the technicians and are in a better position to know their qualifications. Therefore, when there is an opportunity for promotion, the lead knit technicians are able to determine which technician I has progressed enough to warrant a promotion to Level II. The final decision regarding promotion rests with the Director.

Lead knit technicians are responsible for performing annual evaluations of the knit technicians I and II, and these evaluations play some unspecified role in granting pay raises. Because of the Employer's financial circumstances, employees have not received a pay raise since 2001, and annual performance evaluations appear to have been informally suspended since that time. In addition to the written evaluations that are

⁸ The Employer is just now emerging from bankruptcy but is still in a dire financial situation since a fire that occurred in 1998.

⁹ Lead knit technician Steve Hallett testified that he recommended one of the technicians on his team be terminated for poor attendance and performance and his recommendation was followed.

nominally performed annually, lead knit technicians informally evaluate the knit technicians throughout the year by giving feedback and sending them to training, if necessary.¹⁰

III. *Authority to effectively recommend discipline*

During the day shift, when the Director and the Manager are present in the buildings, they get involved in the disciplinary process. Thus, if there is a problem during the day shift with the knit technicians I or II, a lead knit technician brings it to the Director's or the Manager's attention, an investigation ensues, and the employee is disciplined. Nevertheless, lead knit technicians can issue oral or written warnings for minor infractions without first checking with the Director or the Manager. Lead knit technicians on the night and weekend shifts act independently of the Director or the Manager. They have the authority to send technicians home early, when there is a problem, without first checking with anyone. In all cases, the technicians have the right to meet with the Director or the Manager to discuss the discipline imposed on them. There is no evidence, however, that a lead knit technician's disciplinary action has been rescinded.

Lead knit technicians act as supervisors of the production employees when a production supervisor is not available. There is evidence that a lead knit technician on the D shift has filled in for a production supervisor for months while the supervisor was out. No evidence was introduced to delineate the duties of a lead knit technician who acts as a production supervisor.

Analysis and Conclusion

The Employer asserts that the eight lead knit technicians are supervisors and should be excluded from the bargaining unit. The burden of proving supervisory status rests squarely on the party asserting that claim. *Bennett Industries*.¹¹ For the reasons set forth below, I find that the Employer has met its burden and that the lead knit technicians should be excluded from the unit.

Supervisor is defined in Section 2(11) of the Act to mean any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use independent judgment. An employee is a statutory supervisor if he or she has (1) the authority to engage in any of the supervisory functions, (2) his or her exercise of supervisory authority "is not of a merely routine or clerical

¹⁰ Employees have not received an evaluation since 2001, nor have they received raises or promotions since then.

¹¹ 313 NLRB 1363 (1994).

nature, but requires the use of independent judgment," and (3) the authority is held in the interest of management. *NLRB v. Kentucky River Comm. Care, Inc.*¹² The Board has noted that the indicia of supervisory status contained in the statute are set forth disjunctively, and if a person meets any of those indicia, he must be considered a supervisor. *Hydro Conduit Corp.*¹³ Thus, a person need possess only one of the specific criteria listed, or the authority to effectively recommend, as long as the performance of that function is not routine but requires the use of independent judgment. *Pepsi-Cola Co.*¹⁴ The authority to hire or to effectively recommend hiring, using independent judgment, is itself sufficient to confer statutory supervisory status. *Fred Meyer Alaska, Inc.*¹⁵

I find that the record establishes that the lead knit technicians have the authority to direct and assign duties to technicians, and that authority is not merely routine or clerical in nature, and the authority is clearly exercised in the interest of management. On a daily basis, in assigning duties, lead knit technicians consider the individual technicians' skills and experience and match them to the demands imposed by machinery of varying complexity. In addition, lead knit technicians determine production priorities and demands, and maintenance requirements and make assignments, including overtime assignments, accordingly. I find that the lead knit technicians' assignment and direction of their respective teams involve the type of independent judgment contemplated by Section 2(11). *Arlington Masonry Supply, Inc.*, 339 NLRB No. 99 (July 21, 2003)(Maintenance Supervisor Justice).

In addition, the record evidence supports a finding that lead knit technicians effectively recommend pay raises, promotion, and discipline of technicians on their teams. Although there is not a great deal of evidence with respect to these indicia, there is nothing in the record calling this evidence into question. Specifically with respect to the suspension of annual appraisals and the granting of pay raises, it appears that these actions have been suspended only because of the Employer's financial difficulties. No record evidence suggests these authorities have been permanently removed from the lead knit technicians. See *Fred Meyer Alaska, Inc.*,¹⁶ in which the Board determined that a meat manager, who possessed the authority to hire but had not exercised that authority, was a supervisor within the meaning of Section 2(11). See also, *Tesoro Petroleum Corporation*,¹⁷ where the Board held that shift supervisors, who had a broad written

¹² 532 U.S. 706, 713 (2001) (citing *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-74 (1994)).

¹³ 254 NLRB 433, 436 (1981).

¹⁴ 326 NLRB 1062, 1063 (1999).

¹⁵ 334 NLRB 646, 649 (2001).

¹⁶ *Supra*, at 649.

¹⁷ 192 NLRB 354 (1971).

description of powers, are statutory supervisors despite the absence of a showing of exercise of those powers.

Moreover, secondary indicia such as the lead knit technicians' pay differential, allotment of vacation and sick time per year, offices, and access to the Employer's computer system are circumstantial evidence indicative of statutory supervisory status. *McClatchy Newspapers*.¹⁸

Petitioner relies on *North Shore Weeklies, Inc.*¹⁹ to support its position that the lead knit technicians are not supervisors within the meaning of the Act. Petitioner's reliance is misplaced. In *North Shore Weeklies*, the Board affirmed a Regional Director's decision finding that the Employer's press supervisors were not statutory supervisors. The Board found that the press supervisors assigned work to their crewmembers from a scheduled work list prepared by management. The Board also found that the press supervisors' assignment or direction was not based on anything other than experience and knowledge of the craft skills necessary to operate the presses. *North Shore Weeklies*.²⁰ That case is distinguishable. Here, the lead knit technicians are solely responsible for directing their teams. They have the responsibility to devise a work list based on their individual assessments of production requirements, maintenance demands, and the skills of the technicians on their teams. The assignment and direction of work performed by the lead knit technicians is neither as routine nor as constrained by employer guidance as was the case in *North Shore Weeklies*.

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time commercialization knit technicians, knit technicians I, knit technicians II, lead pipefitters, lead mechanical group leaders, breakdown leadpersons, senior instrument technicians, lead senior instrument technicians/dye house, and general stockroom clerk but excluding lead knit technicians, working supervisor breakdowns, the planner/maintenance, the stockroom supervisor, the boilerroom stationary engineers, the manager finishing/inspection, and the supervisor maintenance/dye house, and all other employees, managers, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of

¹⁸ 307 NLRB 773 (1992).

¹⁹ 317 NLRB 1128 (1995).

²⁰ 317 NLRB at 1128.

election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date, and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for purposes of collective bargaining by Area Trades Council, IUOE 877, NERCC Local 51, Plumbers Local 12, IBEW Local 103, Painters District Council #35.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*,²¹ *NLRB v. Wyman-Gordon Co.*²² Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director, who shall make the list available to all parties to the election. *North Macon Health Care Facility*.²³ In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before September 30, 2003. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

²¹ 156 NLRB 1236 (1966).

²² 394 U.S. 759 (1969).

²³ 315 NLRB 359 (1994).

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by October 7, 2003.

/s/ Rosemary Pye

Rosemary Pye, Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072

Dated at Boston, Massachusetts
this 23rd day of September, 2003.

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